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Supreme Court, U.S.
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In The
Supreme Court of the United States

OFFICE OF THE CLERK

FRANKLIN JAY SCOTT, JR., A MINOR;
NICHOLAS THOMAS, A MINOR,

Petitioners,

v.

SCHOOL BOARD OF ALACHUA COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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41PP

QUESTION PRESENTED

1. May a public high school ban the non-disruptive display of the Confederate Battle flag?

PARTIES TO THE PROCEEDING

Petitioners are Franklin J. Scott, Jr. and Nicholas Thomas. Petitioners were plaintiffs in the United States District Court for the Northern District of Florida and Appellants before the United States Court of Appeals for the Eleventh Circuit.

Respondent is the School Board of Alachua County, a public school board organized under the Constitution of State of Florida. Respondents were defendants and appellees below.

CORPORATE DISCLOSURE

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals in *Franklin J. Scott, Jr. and Nicholas Thomas, The School Board of Alachua County*,324 F.3d 1246 (11th Cir. 2003).

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals is reported at *Scott v. School Board of Alachua County* 324 F.3d 1246 (11th Cir. 2003) and set out hereinafter as Appendix A. The district court's unpublished summary judgment Memorandum and Order is set out hereinafter as Appendix B. *See Scott v. School Board of Alachua County,* No. 1:01cv29 MMP (Aug. 7, 2002).

STATEMENT OF JURISDICTION

The judgment of Eleventh Circuit Court of Appeals was entered on March 20, 2003. This Petition for Writ of Certiorari is filed with ninety (90) days of the filing of that judgment.

Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331, the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. The First Amendment states, in pertinent part:

> Congress shall make no law .... abridging the freedom of speech, or the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment states, in pertinent and part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners instituted this civil rights action pursuant to 42 U.S.C. § 1983 which states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State... subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

As the district court decided this case on a motion for summary judgment, the facts are derived from the record below and construed in a light most favorable to the Petitioners.

In 1995, when Dr. Lamar Simmons assumed the position of principal of Santa Fe High School in Alachua, Florida, he established a ban on the display of Confederate Battle flags and similar symbols on school grounds. This unwritten ban on Confederate flag symbols was not based upon any specific incident nor any general sense of racial tension at the school, let alone any actual disruption attributable to the display of Confederate Battle flag. Rather, Principal Simmons' ban was based on his belief that it might avoid potential problems in the future.

Since 1995, the unwritten ban on the display of Confederate Battle flags at Santa Fe High School has remained in full force and effect. The ban is consistently and routinely enforced by Santa Fe High

School administrators and discipline is meted out to students who refuse to obey. The Alachua County School Board is fully aware of the ban on the display of Confederate Battle flags and symbols at Santa Fe High School and has expressly ratified the policy. The ban remains in full force and effect today.

During the 2000-2001 academic school year, Petitioners, Franklin J. Scott, Jr. ("Scott") and Nicholas Thomas ("Thomas") were juniors attending Santa Fe High School. Both Scott and Thomas have ancestors who fought for the Confederacy during the Civil War. For this and other reasons, both Scott and Thomas are proud of their Southern Heritage.

On the morning of October 24, 2000, Scott drove his vehicle into the Santa Fe High School student parking lot with a Confederate Battle flag flying from his antenna. Upon parking, he furled the Confederate Battle flag and covered it with a PVC tube. Shortly thereafter, Santa Fe School administrators suspended him for two (2) days for "displaying a Confederate Battle flag on his truck as he was entering campus." Additionally, the Alachua County School Board ("the School Board") revoked his zoning exception requiring him to transfer to Bucholtz High School in Gainesville, Florida for the remainder of the school year

On October 4, 2000, Thomas wore to school a T-Shirt entitled "Legends of Gray" which had a small logo on the front left breast depicting a Confederate Battle flag with the phrase "Legends in Gray" superimposed. On the back of his T-Shirt was an artistic rendering of a company of Confederate Civil

War soldiers marching in a field carrying the First National flag of the Confederacy and Confederate Battle flag. School administrators ordered him to remove the T-Shirt and issued a discipline warning for "dress code violation-Confederate Flag." Subsequently, Thomas again wore the T-Shirt on October 19, 2000. However, on that day, he was not scheduled to attend classes at Santa Fe High School. Rather, he was at school solely to meet another student to travel to a school-approved agricultural conference in Georgia. Notwithstanding, school administrators observed his Legends in Gray T-Shirt and issued a one-day in-school suspension for "dress code violation-Confederate Flag on T-Shirt."

In neither case did Scott's or Thomas' display of the Confederate Battle flag disrupt school activities nor threaten to incite or inflame violent conduct. Rather, Scott and Thomas were disciplined solely because of their violation of the school's unwritten ban.

Since the institution of the ban on the display of Confederate Battle flags at Santa Fe High School in 1995, there have been no documented instances of disruption precipitated or inflamed by the display of the Confederate Battle flag. Indeed, the only documented instance of racial tension at Santa Fe High School during the relevant period concerned a fight between two students over a seat on a bus. This altercation did not involve a display of a Confederate Battle flag and occurred in the 1998-1999 academic school year - a full two years before discipline meted out to Scott and Thomas in the instant case.

Petitioners instituted this civil rights case under 42 U.S.C. § 1983 when the School Board refused to expunge the suspensions from their records and reaffirmed the continuing ban on the display of Confederate Battle flags at Santa Fe High School. Petitioners claimed deprivation of their constitutional civil rights as secured by the First Amendment. The district court granted the School Board's motion for summary judgment, concluding that there was no constitutional violation. *Scott,* Appendix B. On appeal, the Eleventh Circuit affirmed the lower court's granted summary judgment, also finding no constitutional violation. *Scott,* 324 F.3d 1246 (11th Cir. 2003); Appendix A.

REASONS FOR GRANTING THE WRIT

I.

A conflict has developed among the circuits as to whether a public high school student possesses the constitutional right under the First Amendment to the non-disruptive display of Confederate Battle flag symbol. In the case below, the Eleventh Circuit held that "Principal Simmons' unwritten ban of Confederate flag on school grounds was not an unconstitutional restriction of the plaintiff's First Amendment rights. As such, there is no actionable § 1983 claim in this case." *Scott,* 324 F.3d at 1247, A-2. Further, the appellate court stated:

> Although public school students' First Amendment rights are not forfeited at the school door, those rights should not

> interfere with the school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve. Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school.

Id. at A-3.

By so holding, the Eleventh Circuit has established a rule that public high school students do not enjoy a constitutional right to the non-disruptive display of Confederate Battle flags under the First Amendment. This holding is in conflict with numerous other Courts of Appeal which have recognized a public high school student's constitutional right to display a Confederate Battle flag subject to the principles of non-disruption enunciated by this Court in *Tinker v. Des Moines Independent County. School Dist.*, 393 U.S. 503 (1969). *E.g., Castorina v. Madison County School Board,* 246 F.3d 536 (6th Cir.2001); *Augustus v. The School Board of Escambia County,* 507 F.2d 152 (5th Cir. 1975); *Smith v. St. Tammany School Board,* 316 F. Supp 1174, 1175 (E.D.La. 1970), *aff'd* 448 F.2d 414 (5th Cir. 1971) (*per curiam); see also Sypiniewski Warren Hills Regional Board of Education,* 307 F.3d 243, 254 (3rd Cir. 2002), *cert. denied* 123 S.Ct. 2077 (2003) (in *dicta,* the Court acknowledged students'

constitutional right to the display of the Confederated Battle flags, but, due to the substantial and concrete evidence of disruptions related to the Confederate Battle flag, suggested such a ban was appropriate under *Tinker); West v. Darby Unified School District No.* 260, 206 F.3d 1358 (10th Cir. 2000), *cert. denied* 531 U.S. 825 (2000)(recognizing the constitutional right to display Confederate Battle flag at a public high school, but upholding a ban due to substantial and concrete evidence of prior disruption related to the Confederate Battle flag); *Melton v. Young*, 328 F. Supp. 88 (E.D. Tenn. 1971), *aff'd*, 465 F.2d 1332 (6th Cir. 1972) (semble); *Phillips v. Anderson County School District 5*, 987 F. Supp. 488 (D.S.C. 1997)(semble).

In *Castorina v. Madison County School Board* 246 F.3d 536 (6th Cir. 2001), the Sixth Circuit reversed a lower court's grant of summary judgment to a school board that had suspended a public high school student for wearing a Hank Williams, Jr. T-Shirt that prominently displayed two Confederate Flags and the phrase "Southern Thunder." In reaching this conclusion, the Sixth Circuit acknowledged the public high school students' constitutional right under the First Amendment to symbolic expression involving a T-Shirt depicting Confederate flags. Further, the *Castorina* court reversed the lower court's summary judgment for the school board because the ban on Confederate Battle flag was instituted "without any showing of disruption." *Id.* at 542.

Accordingly, the Sixth Circuit's recent holding in *Castorina* is in direct and irreconcilable conflict with the Eleventh Circuit's holding in the case at bar.

Absent a Writ of Certiorari issuing to resolve this conflict, an anomalous result will ensue whereby the constitutional rights of public high school students under the First Amendment are dependent upon the location of the public school that they attend. Public high school students in Ohio, Colorado and New Jersey would possess the constitutional right to the non-disruptive display of Confederate Battle flags at school, whereas a student in Alabama would have no constitutional right to challenge an unsubstantiated ban on the display of Confederate Battle flags. Indeed, absent the grant of certiorari, a curiously ironic result will arise: a student living in States that remained with the Union during the Civil War would have the constitutional right to the non-disruptive display of Confederate flags at school while students residing in states that seceded from the Union [where students' ancestors are much more likely to have fought on the side of the Confederacy] would be denied the constitutional right to the non-disruptive display of a Southern Heritage symbol such as the Confederate Battle flag.

REVIEW WILL AFFORD CLARITY AS TO THE SCOPE AND STANDARD OF RESTRICTIONS ON PUBLIC STUDENTS' FIRST AMENDMENT RIGHTS OF EXPRESSION

II.

It has almost been a quarter of a century since this Court recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker*

v. Des Moines Community School Dist, 393 U.S. 503, 506 (1969):

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which State must respect, just as they themselves must respect their obligations to State. In our system students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Id at 511.

In the years since *Tinker*, this Court has addressed the First Amendment rights of public school students on two other occasions. First, in *Bethel School Dist., No. 403 v. Fraser*, 478 U.S. 675 (1986). Second, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Fraser* upheld a school's decision to discipline a student after he used "offensively lewd and indecent speech" during a speech nominating a classmate for a position in student government. In *Hazelwood*, this Court upheld the school's decision to censor certain articles in a school newspaper. While many courts have recognized that *Fraser* and *Hazelwood* involve the right of a school to control speech in fora that bear the

imprimatur of school sponsorship (i.e., a school assembly and a school newspaper), other courts have questioned the continued validity of *Tinker* in light of *Fraser* and *Hazelwood*. *See Scott*, 324 F.3d at 1248, A-4; B-5; *West v. Darby Unified School District No. 260*, 23 F.2d 1223, 1233-34 (D. 1998), *aff'd, on other grounds* 206 F.3d 1358 (10th Cir.), *cert. denied* 531 U.S. 825 (2000). Nowhere has this struggle to juxtapose *Fraser* and *Hazelwood* with *Tinker* been more confused than in the Eleventh Circuit.

In *Denno v. School Board of Alachua County*, 182 F.3rd 780 (11th Cir. 1999), *vacated* 193 F.3d 1178, *rev'd in part on rehearing*, 218 F.3d 1267 (11th Cir.), *cert. denied*, 531 U.S. 958 (2000), the Eleventh Circuit reviewed the grant of qualified immunity to school officials who suspended, attempted to expel, and filed criminal charges against a public high school student for displaying a four inch by four inch Confederate Battle flag during the school lunch period. Initially, the Eleventh Circuit reversed the lower court's grant of qualified immunity finding that the student had a "clearly established constitutional right" to the non-disruptive display of the Confederate Battle flag under *Tinker*. *Denno*, 182 F.3d 780 (11th Cir. 1999). However, on *sua sponte* panel rehearing, the Eleventh Circuit changed course and affirmed the grant of qualified immunity finding that *Fraser* and *Hazelwood* as well as other subsequent non-binding precedents had sufficiently muddied the legal landscape so as to render the constitutional right of a public student's non-disruptive display of Confederate Battle flag to become "unclear." *Denno*, 218 F.3d 1267, 1274 (11th Cir.

2000). Interestingly, the *Denno* court declined to clarify the legal landscape in this regard. *Id.* at 1274 n. 5.

The shadow of uncertainty cast by the Eleventh Circuit's opinion *Denno* has introduced the belief in the Eleventh Circuit that a ban on non-disruptive symbolic expression may be upheld not under the *Tinker*, but alternatively under a "so called" *Fraser* standard. No where is this belief more evident in the district court's ruling in the instant case.

As an alternative basis to granting summary judgment to the School Board, the district court stated:

> Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government." To do so, they must have the flexibility to control the tenure and contours of student speech within the school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption.

Scott, 324 F.3d at 1248, A-4; B-5. Thus, the district court reasoned that because the Confederate Battle flag evokes different and highly charged emotions, the School Board had the right and duty to "contour the range of expression" of students on such volatile issues so as to avoid "hurt feelings" and "emotional trauma." *Scott*, 324 F.3d at 1249, A-6—A-7; B-8.

Granting review in the instant case will bring clarity to this muddied legal landscape. Review will guide the lower courts as well as public school administrators throughout the country in knowing whether non-disruptive symbolic expression by students can be lawfully prohibited under *Tinker* only with substantiated and concrete evidence of disruption or whether such speech can be banned under *Fraser* without any demonstrated evidence of disruption, solely to "inculcate the habits and manners of civility" in their students.

Should this Court grant certiorari and reaffirm the standard enunciated in *Tinker*, review will also have the salutary benefit of providing guidance as to the level of specificity and concreteness required to satisfy a prohibition of expression under *Tinker*. On the one hand, some courts have held that such a showing must be specific, concrete and demonstrable, and **not** some remote apprehension of a disturbance. *See Saxe the State College Area School District*, 240 F.3d 200, 212 (3rd Cir. 2001); *Chalifoux v. New Caney Independent School District*, 976 F. Supp 659, 667 (S.D. Tex.1997); *Clark v. Dallas Independent School District* 806 F. Supp. 116, 120 (N.D. Tex. 1992). On the other hand, courts such as the district court below have found a ban is justified by any evidence of racial conflict, no matter how remote in time and unrelated to the symbolic display of the Confederated Battle flag in question.

CONCLUSION

There is no question that the symbolic display of the Confederate Battle flag can evoke strong and differing emotions: those of heritage and pride as well as those anger and humiliation. Yet, symbolic expressions, even those of hate, *see Virginia v. Black*, __ U.S. __, 123 S. Ct. 1536 (2003), are entitled to protection under the First Amendment:

> And it is as a free speech case, not as a Confederate flag case, that this [Petition] must be resolved.
>
> * * *
>
> [T]he First Amendment was not written for the vast majority of [Americans]. It belongs to a single minority of one. It is easy enough for us as judges to uphold expression with which we personally agree or speech we know will meet with general approbation. Yet pleasing speech is not the kind that needs protection.
>
> Our Constitution safeguards contrarian speech for several reasons. As the Civil Rights Movement demonstrates, yesterday's protest can become tomorrow's law and wisdom. Other contrarian speech should move popular majorities to reaffirm their own beliefs rather than suppress those of others. The reminders of history's most tragic errors

> only deepen our commitment to the dignity of all citizens: The Constitution that houses the First Amendment also shelters the Fourteenth, an everlasting reminder that a nation betroth to liberty and equal justice under law must remain vigilant to realize both.

Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing *en banc*).

The issues presented in this Petition are of great Constitutional import warranting the issuance of a writ of certiorari.

Respectfully Submitted,

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Opinion of the
Eleventh Circuit Court of Appeals
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Order and Memorandum
The Honorable Maurice M. Paul from
The Northern District of Florida at Gainesville
filed August 7, 2002..... B-1

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

FRANKLIN JAY SCOTT, JR., a Minor, and NICHOLAS THOMAS, a Minor,
Plaintiffs-Appellants,

v.

SCHOOL BOARD OF ALACHUA COUNTY,
Defendant-Appellee.

No. 02-14931

Non-Argument Calendar

Filed March 20, 2003

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, BIRCH and RONEY, Circuit Judges.

PER CURIAM:

Plaintiffs Franklin Jay Scott, Jr. and Nicholas Thomas ("Plaintiffs"), then both Santa Fe High School students, filed a 42 U.S.C. § 1983 lawsuit against defendant School Board of Alachua County ("School Board"), alleging that the discipline imposed by Principal Lamar Simmons--school suspensions--for their displaying of a Confederate flag on school premises, after previously being told not to do so, violated their First Amendment right to symbolic

speech. The district court granted the School Board's motion for summary judgment.

Plaintiffs appeal asserting three arguments. They first argue that their school suspensions were based on an inadequate showing of a material and substantial disruption and thus violated the Court's decision in *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Next, plaintiffs argue that the School Board's "after-the-fact justifications" for Principal Simmons' unwritten ban of Confederate flags were pretextual and thus expose the School Board to monetary liability. Third, plaintiffs assert that genuine issues of material fact exist as to whether: (1) the School Board was aware or was deliberately indifferent to Principal Simmons' unwritten ban of Confederate flags and (2) the racial impact of a prior disruption in the high school was adequate to precipitate Principal Simmons' unwritten ban.

After careful review of the briefs, record, and relevant case law, we affirm the decision of the district court, holding that Principal Simmons' unwritten ban of Confederate flags on school grounds was not an unconstitutional restriction of the plaintiffs' First Amendment rights. As such, there is no actionable § 1983 claim in this case. Having decided that, we need not consider whether the Board was aware or was deliberately indifferent to Principal Simmons' unwritten ban of Confederate flags.

Prior to setting forth the applicable portions of the district court's well-reasoned opinion, we note that

this First Amendment freedom of expression case stands against the unique backdrop of a public school. Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve. Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school.

The district court properly determined that Principal Simmons' unwritten ban on displaying the Confederate flag was not a violation of the plaintiffs' First Amendment rights. The applicable portions of the Order of District Judge Maurice M. Paul giving the reasons for this decision, which we accept, are as follows:

> Simply put, the defendant's second argument is that the ban on Confederate symbols was appropriate based on the potential disruption that the displaying of Confederate symbols would likely create. After a careful analysis of *Denno v. School Bd. of Volusia County,* 218 F.3d 1267 (11th Cir. 2000), *Tinker v. Des Moines Independent Comm. School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969) and *Bethel School District v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 972 L. Ed. 2d 549

(1986), the Court concludes that school officials can appropriately censure students' speech under either of the following two theories. First, from the *Tinker* case, school officials are on their most solid footing when they reasonably fear that certain speech is likely to "appreciably disrupt the appropriate discipline in the school." *Denno*, 218 F.3d at 1271, citing *Tinker*, 393 U.S. at 514, 89 S.Ct. 733. Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government." To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption. *Denno*, 218 F.3d at 1271. As the Supreme Court stated in *Fraser*:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive

> or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U.S. at 508, 89 S.Ct. at 737.... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board. The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. [478 U.S.] at 683, 106 S.Ct. at 3164.

In the case sub judice, however, the above language merely begs the question. The real difference of opinion in this case, of course, is whether the symbol should be considered "vulgar and offensive" at all. That is, some say the symbol is not offensive if not intended to be offensive. Others say it is innately offensive,

while still others argue that, even if the symbol is not intended to be offensive or innately offensive, it is still dangerous because it is perceived as offensive by so many people.

This debate, which is being played out in state legislatures, newspaper editorial columns and classrooms across the South is exemplified in the expert witness disclosures offered by the two sides in this case. The plaintiffs' experts plan to testify that "the Confederate Battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical and political principals of a decentralized form of government in which states and local government retain all powers not expressly ceded to the centralized federal government under the constitution" and that thus the flag is merely "a symbol of southern heritage." (Disclosure of proposed expert Marshall DeRosa, PhD, doc. 19). The defendant's expert plans to testify that "from its inception, the confederacy was a political movement dedicated to the preservation of the institution of slavery. Therefore from its inception, the confederacy and its symbols represented approval of white supremacy" and that "the confederate flag is a symbol that has acquired numerous racist associations to the point that the flag itself has understandably come to be perceived as a racist symbol." (Disclosure of proposed expert Fitz Brundage, PhD, doc. 24).

The problem, of course, is that both of them are correct. And they are correct not only in describing the different emotions this symbol evokes, but also in connoting the depth of those emotions through their choice of words. Words like "symbol", "heritage", "racism", "power", "slavery", and "white supremacy" are highly emotionally charged and reveal that for

many, perhaps most, this is not merely an intellectual discourse. Real feelings--strong feelings--are involved. It is not only constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues, it is their duty to do so. The Court thus agrees with *Denno* in its approval of the following language from the United States District Court in Kansas:

> Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in "terms of debate highly offensive or highly threatening to others."... There is no evidence that the school district has attempted to suppress civil debate on racial matters, but the district had concluded that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are in appropriate in the school context.

Denno, 218 F.3d at 1273, citing *West v. Derby Unified School Dist. No. 260*, 23 F. Supp. 2d 1223, 1233-34 (D.Kan.1998), *aff'd*, 206 F.3d 1358 (10th Cir.2000)(quoting *Fraser*, 478 U.S. at 683, 106 S.Ct. 3159).

In light of the above principles, the Court finds that the ban on the display of Confederate symbols was not unconstitutional. School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke. Therefore, under both *Tinker* and *Fraser*, the school administrators did nothing wrong in banning the display of Confederate flags on school property.

In light of the plaintiffs' constitutional rights by banning the display of Confederate flags on school grounds and subsequently enforcing the ban by suspending them. Having found no constitutional right violated, the plaintiffs have failed to set forth a prima facie case for § 1983 relief. The district court properly granted the defendant's motion for summary judgment.

AFFIRMED

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[1] Pursuant to the Joint Stipulation as doc. 69, the students themselves have been substituted as plaintiffs in place of their guardians who were the originally named plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

FRANKLIN SCOTT, and
NICHOLAS THOMAS,

Plaintiffs,

vs. **CASE NO. 1:01cv29 MMP**

ALACHUA COUNTY SCHOOL BOARD,

Defendants,

Filed August 7, 2002

ORDER

This matter is before the Court on the motions for summary judgment filed by both sides in this case. (docs. 30 and 34). For the reasons which follow summary judgment is granted in favor of the defendant.

This case involves two students[1] who were punished by Santa Fe High School administrators for displaying the Confederate Battle flag at school after being told not to do so. One student was suspended and the other was suspended and had his zoning exemption revoked. Plaintiffs produced evidence that

prior to October 2000, at least four students had been told not to wear the Confederate Battle flag to school, and that Dean Loretta Shane acknowledged the existence of a rule at Santa Fe High School banning the display of the battle flag because it "offended certain people." In September of 2000, Mr. Scott displayed a battle flag on his vehicle and was told not to do so by Dean Shane. A month later, he rode into the school parking lot with the battle flag on his vehicle's antenna but immediately removed it once he parked. Nevertheless, he was suspended by the school for displaying the battle flag on school campus. His zoning exemption was also revoked, causing him to have to change schools the following year. Mr. Thomas wore a shirt to school in September of 2000 which contained the Confederate Battle flag and was given in-school suspension and told not to wear it on campus. In October of 2000, he wore the shirt again and was given another stint of in-school suspension.

The two students sued, seeking a declaration that students possess the constitutional right to display the Confederate Battle flag and that the school's ban on display of the battle flag is unconstitutional. Additionally, the students asserted a claim for injunctive relief and damages under 42 U.S.C. § 1983.

The defendant moved for summary judgment under two theories. First, defendant relies on *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 663 (1978), to claim that the School Board did not have a formal policy banning the display of the battle flag, that the school administrators were not final policymakers regarding the display of the battle flag,

and that the ban on the battle flag was not so widespread and pervasive as to rise to the level of a school board policy. Without one of those three factors being present, the actions of the school administrators cannot be the basis of liability for the school board. *Id.*

The Court agrees that there is no evidence of a promulgated school board policy covering the display of Confederate Battle flags. Additionally, as in *Denno v. School Bd. of Volusia County, Fla.*, 218 F 3d 1267 (11th Cir. 2000), the school administrators in this case were not final policymakers because their decisions were subject to meaningful administrative review. See School Board of Alachua County Code of Student Conduct for Secondary Schools, 2001-02. Moreover, as in *Denno*, administrators at a single school out of the forty-five schools in Alachua County cannot logically be said to set final policy for the whole county. Finally, although the plaintiffs have shown several instances of the implementation of the ban at Santa Fe High School, they have not provided evidence that different schools were enforcing such a ban throughout the district and that the School Board was aware of it or were deliberately indifferent to it. Thus, the ban was not so widespread and pervasive as to the rise to the level of a school board policy.

Because of the above facts, defendant argues that § 1983 liability cannot be imposed on the school board. However, the Eleventh Circuit has held that a municipality's failure to correct the constitutionally offensive actions of its employees can rise to the level of a custom or policy "if the municipality tacitly authorizes these actions or displays deliberate

indifference" towards the misconduct *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir. 1987). In the instant case, the School Board has gone further than "tacitly authorizing" the actions. In the stipulations filed at doc. 49, the School Board states that while it has not officially adopted a district-wide Confederate flag policy, "[t]he School Board of Alachua County is fully aware of and approves of Principal Simmons' decision to prohibit the display of Confederate Flags and symbols at Santa Fe High School." (doc. 49, ¶ 2).

The Court finds that this after-the-fact ratification of the principal's decision is enough to support the plaintiffs' claims for forward-looking injunctive relief under 42 U.S.C. § 1983. However, because the plaintiffs can offer no evidence that the school board knew of the ban or even tacitly supported the ban at the time of the actions underlying this case, the Court finds no basis for imposing monetary damages under *Monell* against the school board. Thus, summary judgment is granted for the defendant with regard to the compensatory damages claim under § 1983, and the Court must turn to defendant's second argument with regard to the injunctive and declaratory claims.

Simply put, the defendant's second argument is that the ban on Confederate symbols was appropriate based on the potential disruption that the displaying of Confederate symbols would likely create. After a careful analysis of *Denno v. School Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000), *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503 (1969) and *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the

Court concludes that school officials can appropriately censure students' speech under either of the following two theories. First, from the *Tinker* case, school officials are on their most solid footing when they reasonably fear that certain speech is likely to "appreciably disrupt the appropriate discipline in the school." *Denno*, 218 F.3d at 1271, citing *Tinker*, 393 U.S. at 514. Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self government." To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption. *Denno* 218 F.3d at 1271. As the Supreme Court stated in *Fraser*:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U.S. at 508, 89 S.Ct. at 737... The determination of what manner of speech

> in the classroom or in school assembly is inappropriate properly rests with the school board. The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

Id. at 683, 106 S.Ct. at 3164

In the case sub judice, however, the above language merely begs the question. The real difference of opinion in this case, of course, is whether the symbol should be considered "vulgar and offensive" at all. That is, some say the symbol is not offensive if not intended to be offensive. Others say it is innately offensive, while still others argue that, even if the symbol is not intended to be offensive or innately offensive, it is still dangerous because it is perceived as offensive by so many people.

This debate, which is being played out in state legislatures, newspaper editorial columns and classrooms across the South is exemplified in the expert witness disclosures offered by the two sides in this case. The plaintiffs' experts plan to testify that "the Confederate Battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical

and political principals of a decentralized form of government in which states and local government retain all powers not expressly ceded to the centralized federal government under the constitution" and that thus the flag is merely "a symbol of southern heritage." (Disclosure of proposed expert Marshall DeRosea PhD, doc. 19). The defendant's expert plans to testify that "from its inception, the confederacy was a political movement dedicated to the preservation of the institution of slavery. Therefore from its inception, the confederacy and its symbols represented approval of white supremacy" and that "the Confederate flag is a symbol that has required numerous racist associations to the point that the flag itself has understandably come to be perceived as a racist symbol." (Disclosure of proposed expert Fitz Brundage, PhD, doc. 24).

The problem, of course, is that both of them are correct. And they are correct not only in describing the different emotions this symbol evokes, but also in connoting the depth of those emotions through their choice of words. Words like "symbol", "heritage", "racism", "power", "slavery", and "white supremacy" are highly emotionally charged and reveal that for many, perhaps most, this is not merely an intellectual discourse. Real feelings—strong feelings—are involved. It is not only constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues, it is their duty to do so. The Court thus agrees with *Denno* in its approval of the following language from the United States District Court in Kansas:

> Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in "terms of debate highly offensive or highly threatening to others."...There is no evidence that the school district has attempted to suppress civil debate on racial matters, but the district had concluded that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context.

Denno, 218 F.3d at 1273, citing *West v. Derby Unified School Dist. No. 260.* 23 F.Supp.1223, 1233-34 (D.Kan 1998), *aff'd* 206 F.3d 1358 (10th Cir. 2000)(quoting *Frazer*, 478 U.S. at 683).

In light of the above principles, the court finds that the ban on the display of confederate symbols was not unconstitutional. School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke. Therefore, under

both *Tinker* and *Frazer,* the school administrators did nothing wrong in banning the display of Confederate flags on school property.

Accordingly it is hereby

ORDERED AND ADJUDGED:

1. The defendant's motion for summary judgment (doc. 30) is GRANTED and the plaintiffs' motion for summary judgment (Doc.34) is denied.

2. The Clerk shall enter judgment for the defendant on all claims, and all other motions should be terminated.

DONE AND ORDERED this 7th day of August, 2002

/S/
Maurice M. Paul, Senior District Judge

Supreme Court, U.S.
FILED
JUL 2 1 2003
OFFICE OF THE CLERK

No. 02-1838

IN THE

Supreme Court of the United States

FRANKLIN JAY SCOTT, JR. and NICHOLAS THOMAS,

Petitioners,

v.

SCHOOL BOARD OF ALACHUA COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit properly affirmed the district court's judgment in favor of the School Board upon finding that Santa Fe High School's ban on the display of Confederate battle flags on school grounds was not an unconstitutional restriction of its students' First Amendment rights.

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Rule:

United States Supreme Court Rule 10 14

STATEMENT OF THE CASE

In setting forth a statement of the case which ignores all unfavorable facts, the students appear to misconstrue well-established law that a court must view the facts and draw all reasonable inferences deducible from those facts in favor of the party against whom a summary judgment is sought *considering all the evidence presented*. Undisputed facts, however unfavorable, cannot be merely ignored.[1]

The record contains uncontradicted evidence that clearly establishes that the intent of the Santa Fe High School administration in enacting the ban on Confederate battle flags was not to restrict the students' ostensible political message, but, rather, was intended to preserve the educational environment on its campus and prevent substantial disruption of school activities.

The record shows that in the spring of 1999, a dean at Santa Fe High School, Loretta Shane, was contacted by school transportation officials to handle a series of racially

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1. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (holding that in reviewing *all the evidence on a motion for summary judgment* a court "should give credence to the evidence favoring the nonmoving party as well as the evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses" *as well as* contemplating that some evidence provided by the interested party may be considered on summary judgment) (emphasis added) (internal quotation omitted); *Chesapeake & Ohio R.R. v. Martin*, 283 U.S. 209, 216 (1931) (holding that even the testimony of the moving party that "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and . . . is not opposed to the probabilities, nor, in its nature, surprising or suspicious, [need not be] den[ied] conclusiveness").

charged incidents that occurred on the school's buses. The tense situation that had been brewing culminated in a major fight on one of the buses, precipitated in part by two students exchanging racial slurs, *i.e.* calling each other "cracker," "whitey," and "nigger."

After the bus arrived at school, the fight spilled over onto campus resulting in a very tense disturbance involving the gathering of hundreds of students. Later that day, Dean Swain observed a backlash among the student body. The black and white students seemed divided and the interaction between them was more limited than normal.

The next day students boarded the bus bearing Confederate battle flags on their backpacks. A concerned black student pointed out Confederate battle flags to the deans. Through discussions with the students, the administration learned that the white students were displaying the Confederate battle flags as a show of support for friends who had been disciplined as a result of the incident on the bus.

The display of the Confederate battle flags coupled with the racial epithets from the day before led the administration to be concerned that ill feelings between the students might continue to grow and escalate. As a result, that day and shortly thereafter, the administration confiscated backpacks embellished with Confederate battle flags. On one of those backpacks, a student wrote words to the effect, "I hate niggers" or "I'd like to kill a nigger."

The school bus incident resulted in a general racial unrest on campus. Dean Shane frequently heard from some black students that they believed that they were being sent to see

her by white teachers because the teachers were prejudiced. Dean Swain also heard from both white and black students that they were being treated unfairly because of their race or that the other race was receiving preferential treatment. The students' parents voiced similar concerns.

In Dean Shane's opinion, the situation was churning and starting to build. Similarly, Dean Swain recounted underlying racial pressure at Santa Fe High School which had the potential to incite or blow up into something much bigger.

Dean Shane confirmed her understanding that students may express themselves in a manner that does not disrupt the orderly process of the educational environment. Moreover, Dean Shane emphasized that she is concerned with the manner and where speech takes place and the disruption that occurs, not the content. Under those principles, Dean Shane believed that the ban on the display of Confederate battle flags on the Santa Fe High School campus was necessary to prevent disruptions and prevent any further escalation of the racial tension.

Similarly, Dean Swain also recognized that students had the right to express themselves so long as that expression did not disrupt the orderly process of education or infringe on the rights of others. In his opinion, the display of Confederate battle flags was disruptive to the educational process.

Dr. Lamar Simmons, the principal at Santa Fe High School, also testified that he believed that banning Confederate battle flags from the campus of Santa Fe High School was necessary to maintain discipline, order, and to preserve the educational environment.

Confederate battle flags were not the only insignia deemed disruptive and, therefore, prohibited on school campus. The Santa Fe High School administration also prohibited clothing that contained references to alcohol or illegal substances, sexual content (such as Hooters and Big Johnson t-shirts), violence, profanity, swastikas, and Malcolm X symbols.

In fact, the administrators tried to be as consistent as possible with all factions in relation to how they handled the dress code. They tried to make a blanket rule that fit all sides for the harmony of the school and to prevent disruption because of clothing worn by either black or white students. All students were made aware of what the administration considered disruptive through classroom discussions devoted to presenting the Code of Student Conduct and providing an opportunity to discuss its contents. The deans would also counsel a student who violated the policy on an individual basis to seek the student's future cooperation.

Nevertheless, on September 18, 2000, Petitioner Scott drove through the parking lot at Santa Fe High School with a five-foot by three-foot Confederate battle flag prominently displayed on a pole in the bed of his pick up truck. White students on a nearby school bus who observed the display stood up and began "hooting and hollering." In response to this incident, some of the black students on the bus expressed concern that there would be problems for the black students at school that day.

After Scott removed the flag from his truck, he was warned not to display the flag again by the administration. Shortly thereafter, Scott returned to school with a two-foot by two-foot Confederate battle flag flying from his antenna.

The next day, October 24, 2000, Scott once again displayed the flag on his antenna as he drove onto the Santa Fe High School campus.

Santa Fe High School administrators suspended Scott for two days. This incident was Scott's fourth disciplinary referral in five weeks while attending Santa Fe High School. As a result of Scott's continued misbehavior, his zoning exception was revoked and he was required to attend his originally assigned school. Pursuant to an agreement between counsel, Scott returned to Santa Fe High School for his senior year.

In October of 2000, Thomas was disciplined for wearing a shirt on school campus that displayed several Confederate battle flags. The first time he was warned not to wear the shirt on school campus again; the second event resulted in a one-day suspension. Neither student sought administrative review of the disciplinary action.

REASONS FOR DENYING THE PETITION

Federal law is well-established that in the public school setting, students' protections under the First Amendment differ from the constitutional protections afforded in other contexts. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Students must exercise their limited right to freedom of expression "in light of the special characteristics of the school environment" and must do so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 506, 513 (citations omitted). Student behavior that "for any reason . . . materially disrupts

class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* (citation omitted).

In this case, the record clearly established a history of racial tension at Santa Fe High School that led the school administration to forecast that the display of the Confederate battle flag might lead to substantial disruption of or material interference with school activities. Notably, this case involves the decision made by administration at a single school out of the forty-five schools within Alachua County. It does not involve a district-wide ban of the Confederate battle flag, but, rather, the isolated decision of a single administration based on the unique history of racial tensions at that particular school.

In this case, in view of the discretionary nature of the educational process, the Eleventh Circuit properly recognized the judicial deference to be given to the judgment of school administrators who have firsthand knowledge of the environment at an individual school when it stated:

> Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve. Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school.

Scott v. School Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003); *see, e.g., Bethel School District v. Fraser*, 478 U.S. 675, 683, 685 (1986) (holding that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," and not with the federal courts) *accord Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (holding that judicial interposition in the operation of the public school system raises problems requiring care and restraint).

Thus, the Eleventh Circuit properly concluded that the school's prohibition of the Confederate battle flag's display on school grounds did not violate the students' constitutional rights. Since the court properly applied well-established law to the underlying facts of this case, review is unwarranted, and this Court should deny the students' Petition for a Writ of Certiorari.

I. THE ELEVENTH CIRCUIT'S RULING DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITIONERS.

The question presented by the students in their Petition is whether a public high school may "ban the non-disruptive display of the Confederate Battle flag." Likewise, the students assert that "the Eleventh Circuit has established a rule that public high school students do not enjoy a constitutional right to the non-disruptive display of Confederate Battle flags under the First Amendment" and suggest that the court upheld an "unsubstantiated ban." (Petition, pg 7, 9, 12). However, the students fail to cite any portion of the Eleventh Circuit's opinion in this matter that expressly states or impliedly

suggests such a broad holding. The reason for their failure to cite any portion of the opinion that actually supports that assertion is simple: neither the Eleventh Circuit nor the district court reached that conclusion.

To the contrary, the Eleventh Circuit held:

> the ban on the display of Confederate symbols was not unconstitutional. ***School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke.*** Therefore, under both *Tinker* and *Fraser*, the school administrators did nothing wrong in banning the display of Confederate flags on school property.

Scott at 1249 (adopting in part the order of the district judge below) (emphasis added).

Thus, after review of the briefs, the record, and relevant case law, the Eleventh Circuit properly applied a *Tinker* analysis in concluding that the Santa Fe High School administration did not violate the students' constitutional rights by banning the display of Confederate battle flags on school grounds. *Id.* at 1247-49. Moreover, the court also properly concluded that the administration reasonably restricted student speech under the alternative *Fraser*

standard. *Id.* The application of the law to the record facts in this matter was entirely appropriate and does not warrant review by this Court.

II. THE ELEVENTH CIRCUIT'S RULING DOES NOT CONFLICT WITH THE SIXTH CIRCUIT'S HOLDING IN *CASTORINA v. MADISON COUNTY SCHOOL BOARD* OR ANY OTHER CASE CITED BY THE PETITIONERS.

In *Castorina ex rel. Rewt v. Madison County School Board*, 246 F.3d 536, 544 (6th Cir. 2001), the Sixth Circuit emphasized the importance of the factual circumstances in school speech cases. In *Castorina*, the Sixth Circuit found that it was "unable to resolve the constitutionality of the school board's actions without knowing the manner in which the school board enforced its dress code and whether Madison County High School had actually experienced any racially based violence prior to the suspensions." *Id.* at 538. Moreover, the students claimed the high school failed to ban clothing bearing the "X" symbol associated with Malcolm X and the Black Muslim movement. *Id.* at 541. Thus, the school's refusal to prohibit this apparel along with the Confederate battle flag gave the appearance of a targeted ban. *Id.*

Accordingly, the Sixth Circuit reasoned that "without any formal factual findings to guide it," construing the facts in the light most favorable to the students, and "[a]ssuming that there ha[d] not been any racially motivated violence or threat in the Madison County schools," it could only conclude that the school had banned only certain racial viewpoints without any showing of disruption. *Id.* at 542. Thus, the court concluded that material questions of fact remained which

rendered that particular case inappropriate for summary judgment. *Id.*; *cf. Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (discussed *infra*).

However, the court the noted that, upon remand, "if the students cannot establish their factual claims, then the principal and school board may have acted within their constitutional authority to control student activity and behavior." *Id.* at 544.

The *Castorina* court declined to apply the *Fraser* analysis to the facts of the case reasoning that the prohibition on the Confederate flag was an attempt to regulate the speech's content, rather than manner of the speech. *Id.* at 542. Moreover, the court noted that "a clear underpinning of the Court's holding in *Fraser* was the disruptive nature of the plaintiff's nominating speech and the fact that the sanctions were not based on one particular political viewpoint." *Id.*

Unlike *Castorina*, the record in this case demonstrates Confederate battle flags were not the only symbols deemed disruptive and, therefore, prohibited on school campus. The uncontradicted testimony of the Santa Fe High School administration demonstrates that they attempted to implement viewpoint neutral regulations for the harmony of the school and to prevent disruption because of clothing worn by students of any race. Moreover, after review of the parties' briefs and the record facts, the Eleventh Circuit explicitly held that "[s]chool officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case."

In sum, the students' Petition misrepresents the holding of the Eleventh Circuit in an effort to create a conflict appropriate for resolution by this Court. However, the decisions in *Castorina* and in this matter were based on analysis of the unique factual record established in each of those cases. In *Castorina*, the record failed to demonstrate that a motion for summary judgment in favor of the Madison County School Board was appropriate. In this case, the record affirmatively demonstrated that no genuine issue of material fact or law existed and that the School Board was entitled to a final summary judgment as a matter of law. The Eleventh Circuit's opinion in this case does not conflict with the Sixth Circuit's decision in *Castorina*.

In addition, in their Petition, the students cite cases from other circuits, without analysis, which they contend are in conflict with the Eleventh Circuit's decision in this matter. (Petition, pg 7). This contention is similarly without merit.

Several of the cases cited by the students support the Eleventh Circuit's conclusion that a history of racial tension may support a prohibition on the display of certain symbols. In *Augustus v. School Bd. of Escambia County*, 507 F.2d 152 (5th Cir. 1975), the court noted that where the record before the court demonstrated a history of substantial racial disturbances, a school board regulation banning all use of racially irritating symbols in a high school under a desegregation order may have been permissible under *Tinker*. In *Smith v. St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir. 1971), the court held that a district court's order banning symbols or indicia expressing the school board's or its employees' desire to maintain segregated schools and requiring that they "shall be removed from the schools and shall not be officially displayed" was fully warranted under

the facts of the case, but made no comment as to the portion of the order allowing students to wear such symbols. Likewise, the court in *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 254-62 (3d Cir. 2002), held that the history of racial difficulties in the school district provided a substantial basis for legitimately fearing future disruption from the kind of speech prohibited by the district-wide policy and noting that the "comprehensive authority of . . . school officials . . . to prescribe and control conduct in the schools" "would likely support a ban of displays of the Confederate flag under *Tinker*." Notably, each of these cases dealt with district-wide bans. In this case, the prohibition was implemented by the administration of a single school within Alachua County based on the history of racial tension at that particular school and, thus, was even more narrowly tailored.

Moreover, the students' cited cases clearly demonstrate that other circuit courts have concluded that *Tinker* does not require school authorities to be absolutely certain that a disruption will occur, nor does it require that an actual disruption occur before they may act. To illustrate, in *West v. Derby Unified School District*, 206 F.3d 1358, 1366 (10th Cir. 2000), the Tenth Circuit held that based upon the history of racial tension, school officials had reason to believe that a student's display of the Confederate flag, when unconnected with any legitimate educational purpose, might cause disruption and interfere with the rights of other students to be secure and let alone. Instead, school authorities need only demonstrate facts which *might reasonably lead them to forecast* substantial disruption of or material interference with school activities. *Tinker* at 514. (emphasis added). Thus, the student's suspension was a valid exercise of the school board's constitutional authority under *Tinker*. *West* at 1366;

see also Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (holding that a student's suspension for refusal to stop wearing a Confederate flag patch did not violate his rights where substantial racial disorder had occurred in the past at the school and school officials had every right to anticipate that a tense racial situation continued to exist); *Phillips v. Anderson County School Dist. Five*, 987 F. Supp. 488, 492 (D.S.C. 1997) (holding that school authorities are not required to wait until disorder occurs if the facts reasonably support a forecast of likely disruption and noting that it has been held that the school authorities actually have a duty to *prevent* the occurrence of disturbances) (emphasis in original) (multiple citations omitted).

In short, the Eleventh Circuit's decision in this matter does not conflict with precedent in other circuit courts. As in *Augustus*, *Smith*, *Sypniewski*, *West*, *Melton*, and *Phillips*, the history of racial tension at the school made reasonable the administrators' concerns about future substantial disruptions from the display of Confederate flag symbols at school. The administration's actions were not based on a mere desire to avoid discomfort and unpleasantness, but rather upon their well-founded belief that the display of Confederate battle flags would interfere with the school's educational environment. Thus, under a *Tinker* analysis, the actions of the school administration were appropriate.

III. COMPELLING REASONS DO NOT EXIST FOR GRANTING REVIEW IN THIS MATTER.

Pursuant to Rule 10, Rules of Supreme Court of the United States, a petition for a writ of certiorari is rarely granted when the asserted error is based on allegedly erroneous factual findings or the misapplication of a properly stated rule of law. Therefore, the students mischaracterize the holding of the Eleventh Circuit in an effort to "muddy the waters" when, in fact, the court properly applied clear legal principles to the facts of this case.

The students assert that granting review in this matter will "guide the lower courts as well as public school administrators throughout the country in knowing whether non-disruptive symbolic expression by students can be lawfully prohibited under *Tinker* only with substantiated and concrete evidence of disruption or whether such speech can be banned under *Fraser* without any demonstrated evidence of disruption." (Petition, pg 13). Therefore, in effect, the students seek an advisory opinion from this Court of what the law would be under a hypothetical state of facts. The Court has emphasized on numerous occasions that it is without constitutional authority to give advisory opinions and its practice is not to decide abstract, hypothetical, or contingent questions. *See, e.g.*, *Preiser v. Newkirk*, 95 S. Ct. 2330 (1975) (holding that judgments of federal courts must resolve a real and substantial controversy providing specific relief through a decree of conclusive character as distinguished from an opinion advising what law would be upon a hypothetical state of facts) (citation omitted); *Golden v. Zwickler*, 89 S. Ct. 956 (1969) (holding that federal courts do not render advisory opinions; for adjudication of constitutional issues, concrete legal issues, presented in actual

cases, not abstractions, are requisite). Since the Eleventh Circuit properly held that the actions of the administration were based on reasonable concerns that the display of the flags would lead to substantial disruption or material interference with school activities, if the Court were to address the question presented by the students, it would be required to declare principles or rules of law which could not affect the outcome or affect the rights of parties in this matter.

As set forth above, *Tinker* does not require school authorities to be absolutely certain that a disruption will occur, nor does it require that an actual disruption occur before they may act. *See, e.g., West v. Derby Unified School District* at 1366 (discussed *infra).* Instead, school authorities need only demonstrate facts which *might reasonably lead them to forecast* substantial disruption of or material interference with school activities. *Tinker* at 514. (emphasis added).

Over the last thirty-four years, expanding upon the foundation set forth in *Tinker*, this Court has emphasized the power of school officials to prevent disturbances to the educational environment on school campuses. *See generally Bethel School District v. Fraser*, 478 U.S. 675 (1986) (holding that the defendant school district acted appropriately in disciplining a student who gave a lewd, but not legally obscene, speech at a school assembly); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (applying a permissive "legitimate pedagogical concern" test in a case involving student's school-sponsored speech). Neither *Fraser* nor *Hazelwood* expressly overrule *Tinker*, rather they merely refine the general principles established in *Tinker* and further define the limited scope of a students' constitutional rights in light of the special characteristics of a public school setting.

In this matter, the Eleventh Circuit did not apply *Fraser* to the exclusion of *Tinker* nor did it question the validity of *Tinker*. The Eleventh Circuit did not hold that the prohibition in this case was constitutional under facts that failed to provide substantiated and concrete evidence of disruption. The court did not hold "a ban is justified by an evidence of racial conflict, no matter how remote in time and unrelated to the symbolic display of the Confederated [sic] Battle flag in question." (Petition, pg 13).

To the contrary, the Eleventh Circuit held that the School Board presented evidence of racial tensions existing at the Santa Fe High School and explicitly acknowledged the reasonableness of the concern that the administration had "regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke." *Scott* at 1249. The court properly applied a *Tinker* analysis in this case when it concluded the administration at Santa Fe High School reasonably restricted the students' speech.

Thus, the students' asserted rationale for review is without basis. Since this case raises no issue that warrants this Court's review, the students' petition should be denied.

CONCLUSION

For the foregoing reasons, the School Board of Alachua County respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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